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IN THE

# SUPREME COURT OF THE UNITED STATES

..... TERM, 1941

No. 181

MAGNOLIA PETROLEUM COMPANY AND UNION PRODUCING COMPANY, *Petitioners,*

v.

EDWIN S. HULL, JOE H. HULL, FANNABEL MYERS, JOINED PRO FORMA BY HER HUSBAND, C. T. MYERS, AND SADIE HULL BIEDERMAN, JOINED PRO FORMA BY HER HUSBAND, CHARLES E. BIEDERMAN, *Respondents*

## PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

*Of Counsel:*
EARL A. BROWN,
HUGH CARNEY,
THOMAS FLETCHER

WALACE HAWKINS,
WM. A. VINSON,
*Attorneys for Petitioners*

ALPHA LAW BRIEF CO., HOUSTON

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## PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TO THIS HONORABLE COURT:

Your petitioners, MAGNOLIA PETROLEUM COMPANY and UNION PRODUCING COMPANY (appellees in the court below), respectfully present this petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit to review the decision and decree made and entered in said Circuit Court of Appeals on the 17th day of April, 1941 (Foster, Hutcheson and McCord, Circuit Judges, sit-

ting). Petition for rehearing was duly filed and denied by the court on May 9, 1941 (Tr. p. 79).

On application of petitioners the issuance of the mandate of the Circuit Court of Appeals was stayed in order to afford petitioners an opportunity to apply to the court for a writ of certiorari (Tr. p. 82).

## Summary Statement of Matter Involved

This cause was originally filed on September 15, 1938, in the District Court of Panola County, Texas, by plaintiffs, who are respondents here, against the defendants, petitioners here, and was thereafter removed to the United States District Court for the Eastern District of Texas. Defendants filed a motion to dismiss in the United States District Court on the ground that the petition or complaint failed to state a claim or cause of action upon which relief could be granted. The motion was sustained by the United States District Court on January 4, 1940, and thereupon plaintiffs appealed to the Circuit Court of Appeals. The latter court reversed the trial court and rendered its decision on April 17, 1941. Petition for rehearing was overruled as stated above. The only issue before the court was as to the sufficiency of the petition, yet the Circuit Court of Appeals attempted to decide the case on the merits and directed the lower court to frame a conditional decree of cancellation of the defendants' oil and gas lease, as prayed for.

In their petition plaintiffs allege that they own certain lands in Panola County, Texas; that their ancestor, E. A. Hull, formerly owned said lands and on October 28, 1926, executed and delivered to Magnolia Petroleum Company an oil and gas lease on said lands; that thereafter Magnolia Petroleum Company assigned an interest in said lease to Union Producing Company; that the oil and gas lease, copy of which is attached as an exhibit to the petition, covers a tract of land recited

therein to contain 5371.6 acres but that in fact there are approximately 6000 acres in the tract.

Plaintiffs then alleged that the defendants drilled and completed two wells on the leased acreage which had produced a certain amount of oil and gas; that defendants refused to drill further; that the properties could be developed so as to produce large royalties; that it was the duty of the defendants to reasonably and diligently develop the said lands for oil and gas; that defendants failed and refused to develop the property as required; that a reasonable and proper development would require that a well be drilled upon each 50-acre tract; that the court should outline a drilling program and that the defendants should be ordered to drill an oil and gas well on at least every 50-acre tract. The relief prayed for was for judgment cancelling the oil and gas lease and for damages in the sum of $200,000 and alternatively for a decree outlining a drilling program and directing the defendants to comply therewith, in default of which cancellation was prayed.

The principal issue raised by the petition was whether or not implied covenants of development could be invoked under the terms of the oil and gas lease. Plaintiffs contend that implied covenants are applicable. Defendants contend that implied covenants are not applicable under this lease for the reason that the matter of development is covered by an express covenant of the lease and that implied covenants are inapplicable where the parties have expressly contracted on development. This issue revolves about the proper construction of the following clause in the lease:

> "It is expressly understood and agreed that grantee is not under obligation to nor compelled to commence or drill any well or wells or conduct any character of operations on the land herein described, during the term of this grant, save and except such as may be reasonably necessary to protect said land from drainage from producing wells on adjoining lands" (Tr. pp. 13-14).

In its opinion the Circuit Court of Appeals failed to decide the proposition that an implied covenant must yield to an express covenant and that there can not be an express and an implied covenant covering the same duty at the same time. It held, however, that the words "term of this grant," as contained in the above quoted clause, had reference only to the first ten years of the term of the lease.

The habendum clause of the lease is in part as follows:

> "To Have and to Hold unto the said grantee, its successors and assigns, said minerals and rights, for the period of ten (10) years from date hereof, and for such other and further period of time as any of such minerals are produced from said land" (Tr. p. 11).

It is the contention of the petitioners that the words "term of this grant" refer to the entire period during which the lease is in force and not merely to the first ten years thereof; and that by reason thereof no development is ever required except such as may be reasonably necessary to protect the land from drainage from producing wells on adjoining lands; and that the District Court was right in so deciding on the motion to dismiss.

Defendants further contend that in any event the decision of the Circuit Court of Appeals should have been limited to vacating the order of dismissal entered by the District Court; that it should have remanded the cause to the lower court with directions to try the case on its merits. Instead, the Circuit Court of Appeals in its opinion directed "the District Judge to frame a decree that the lease shall be terminated, cancelled and held for naught except as to 20 acres around each well already drilled, unless defendants' lessees shall, within a reasonable time to be fixed by the court, commence thereafter diligently to prosecute drilling operations for the development of the lease for oil and gas." Defendants contend that even in the event implied covenants should be applicable,

it would require evidence and a trial on the merits in order for a court to determine whether or not such covenants had been breached, and that, manifestly, a court could not hold that such covenants had been violated when it had nothing before it except the plaintiffs' petition alleging violation.

## Jurisdiction

This petition for writ of certiorari is prosecuted pursuant to the provisions of Section 240 of the JUDICIAL CODE (Title 28, Section 347 U.S. Code) and Rule 38 of the REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES, adopted February 13, 1939 and amended March 25, 1940 and October 21, 1940, providing for review on writ of certiorari of decisions of the Circuit Courts of Appeal.

Petitioners would further show that the Circuit Court of Appeals has rendered its decisions herein on an important question of local law in a way which conflicts with the applicable local decisions, that is, the decisions of the appellate courts of the State of Texas which are controlling on the issues; and also has decided a question of general law in conflict with the weight of authority. Section 4(b) REVISED RULES OF THE SUPREME COURT, supra; ERIE RAILROAD COMPANY v. TOMPKINS, 304 U.S 64; 58 Sup. Ct. Rptr. 817.

Petitioners further contend that the decision of the Circuit Court of Appeals is violative of the FEDERAL RULES OF CIVIL PROCEDURE and particularly Rule 12, and decisions of this court and other federal courts, in that petitioners have been denied the right of a trial of this case on the merits; and that the rights of defendants have been adjudicated solely on the allegations of plaintiffs' petition. Petitioners further contend that reversing the lower court's ruling on a motion to dismiss should have been followed only by a direction that the lower court proceed to a trial of the case. Denial to petitioners of a right of trial on the merits is so great a departure from the

accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision. Section 5(b), Rule 38, REVISED RULES OF THE SUPREME COURT, Fourteenth Amendment to Constitution of the United States.

## Questions Presented

The following are the issues presented by this application:

(1) The Circuit Court of Appeals erred in directing the lower court to decree a conditional cancellation of defendants' lease, because the only issue before it was as to the sufficiency of the complaint in stating a claim upon which relief could be based.

(2) The Circuit Court of Appeals erred in refusing to apply the rules of construction announced by the Supreme Court of Texas, holding that implied covenants of development in an oil and gas lease do not exist in the face of an express covenant on the subject of development.

(3) The Circuit Court of Appeals erred in refusing to follow the decisions of the appellate courts of Texas, and the weight of authority generally, in holding that the phrase "term of this grant" as used in paragraph Third of the lease under construction (Tr. pp. 13-14) applied only to the fixed or ten-year period included in the term stated in the habendum clause (Tr. p. 11), and in not holding that it applied to the entire term ("ten (10) years from the date hereof *and* for such other and further period of time as any of such minerals are produced from said land").

## Reasons Relied on For the Allowance of the Writ

The following reasons for allowance of the writ apply to each of the three questions presented above in their order:

(1) Defendants, believing that the plaintiffs' petition failed

to state a claim upon which relief could be granted, filed their motion to dismiss. The District Court sustained the motion. Plaintiffs appealed from the order of dismissal. There was no issue before the court other than whether the motion should have been sustained. No responsive pleading had been filed. No trial had been held. The only decision the Circuit Court was authorized to render, if it held the lower court's judgment erroneous, was one that should sustain the sufficiency of the petition, and the cause should have then been remanded with instructions to permit a trial on the merits. This the Circuit Court refused to do. Without a trial, and absent one scintilla of evidence in support of the plaintiffs' allegations, the court decreed cancellation of the defendants' lease. No authority for such arbitrary action was announced. Petition for rehearing was filed and an appeal was made for a modification of the decision to permit a trial on the merits and require the plaintiffs to prove the allegations of the petition. This was overruled without comment.

It is elementary that a defendant has the right to test the sufficiency of a plaintiff's petition with a motion or demurrer. An order of court thereon is an appealable order. The decision on such appeal is limited to the question raised, i. e., does the petition state a cause of action. A decision which goes further and attempts to extinguish the rights of a defendant, without permitting him a hearing on the issues, violates the 14th Amendment to the Constitution of the United States, Rule 38, Section 5(b), REVISED RULES OF THE SUPREME COURT; RULE 12, FEDERAL RULES OF PROCEDURE, and rules of decision in many adjudicated cases, which will be cited in the brief which follows this application.

(2) The Supreme Court of Texas in the case of GULF PRODUCTION CO. v. KISHI, 129 Texas 487, 103 S.W. (2d) 965 (and in other cases) has held that where an oil and gas lease contains an express agreement between the parties thereto, on

the subject of development, implied covenants of development cannot be invoked. The lease in this case provided that the lessee was under no obligation to drill or conduct any character of operations on the leased premises during the term of the grant, save and except such as might be reasonably necessary to protect the land from drainage from producing wells on adjoining lands. Nevertheless, the Circuit Court of Appeals held that there were implied covenants of development which should be enforced, and decreed cancellation of the lease upon failure of the defendants to comply with such implied covenants. This holding was directly contrary to the Texas rule, and under the authority of ERIE RAILROAD COMPANY v. TOMPKINS, 304 U.S. 64 and RUHLIN v. NEW YORK LIFE INSURANCE COMPANY, 304 U.S. 202, should be reversed.

(3) The holding that the words "term of this grant" appearing in paragraph Third of the lease (Tr. pp. 13-14), applies only to the ten-year period of the term, instead of the entire term which runs for "the period of ten (10) years and for such other and further period of time as any of such minerals are produced from said land" (Tr. p. 11), is contrary to the rules of construction of the appellate courts of Texas, the weight of authority generally, and ordinary logical reasoning and construction. The "term" of the grant, when construed with reference to time, means the *duration* of the grant; and when given its ordinary legal significance includes "not only the *entire time* for which the lease runs, but the entire estate or interest conveyed by the lease" (emphasis ours). DAVIS v. VIDAL, 105 Texas 244, 151 S.W. 290. Further argument on this issue will appear in the ensuing brief.

WHEREFORE, petitioners, for the reasons heretofore given and hereafter argued in the brief in support of this petition for review, respectfully pray that this court issue a writ of certiorari directed to the United States Circuit Court of Appeals for the Fifth Circuit, requiring said court to certify and

send to this court a full and complete transcript of the record herein, bearing the Circuit Court of Appeals' docket number 9501, to the end that this case may be reviewed and decided by this court as provided by law; and that the judgment and decision of the Circuit Court of Appeals be reversed and the judgment of the District Court affirmed, and that your petitioners have such other and further relief in the premises as to this court may seem just and proper.

WALACE HAWKINS,
WM. A. VINSON,
*Attorneys for Petitioners*

*Of Counsel:*
EARL A. BROWN,
HUGH CARNEY,
THOMAS FLETCHER

## BRIEF IN SUPPORT OF FOREGOING PETITION FOR CERTIORARI

The following argument is offered on each of the three "questions presented" as set forth in the foregoing petition, in their order:

**1. The Circuit Court of Appeals was without authority to grant the relief prayed by plaintiff without a hearing on the merits.**

No trial was had in this case; there has never been a hearing on the merits. Plaintiffs filed their petition seeking cancellation of defendants' oil and gas lease and alleging as grounds therefor the violation of implied covenants of development. Attached to the petition as an exhibit was a copy of the oil and gas lease in question. The lease contained a provision that the grantee was not under obligation to drill any well or wells except such as might be reasonably necessary to protect the land from drainage from wells on adjoining lands. Defendants took the position that the effect of this express covenant was to abrogate the existence of implied covenants in the lease and accordingly filed a motion to dismiss. The lower court, after due consideration, sustained the motion to dismiss and plaintiffs appealed from the order of dismissal (Tr. 38-40).

The foregoing are all of the proceedings which were had in the trial court. The Circuit Court of Appeals in reversing the case should have remanded it for the purpose of permitting the defendants to traverse the allegations of the petition so that a hearing on the merits could follow. Instead, the Circuit Court of Appeals directed the lower court to enter a judgment granting the relief prayed for in the petition.

Such action was not only extraordinary but we say, with respect, that it was arbitrary. Plaintiffs were not entitled to recover by merely alleging breach of implied covenants. Such

allegations must be sustained by proof. Under the decisions of the courts of Texas, a plaintiff who claims that implied covenants in an oil and gas lease have been breached must prove (1) that the lessee has not used reasonable diligence in development, that is, such diligence as an ordinarily prudent and diligent operator would use, and (2) that such development would be profitable not only to the lessor but also to the lessee. RHOADS DRILLING COMPANY v. ALLRED, 123 Tex. 229, 70 S.W. (2d) 576; TEXAS PACIFIC COAL & OIL COMPANY v. BARKER, 117 Tex. 418, 6 S.W. (2d) 1031, 60 A.L.R. 936; FREEPORT SULPHUR COMPANY v. AMERICAN SULPHUR ROYALTY COMPANY OF TEXAS, 117 Tex. 439, 6 S.W. (2d) 1039, 60 A.L.R. 890; W. T. WAGGONER ESTATE v. SIGLER OIL COMPANY, 118 Tex. 509, 19 S.W. (2d) 27; COSDEN OIL COMPANY v. SCARBOROUGH (5 C.C.A.), 55 Fed. (2d) 634. In this case the Circuit Court of Appeals ignored the applicable rule and rendered a judgment of cancellation without any character of proof whatsoever.

It is the general rule that when a record is in such shape that the appellate court cannot in justice determine what final judgment should be rendered the case will be remanded for such other proceedings as may be necessary in the trial court. PANAMA MAILS STEAMSHIP COMPANY v. VARGAS, 281 U.S. 670, 50 Sup. Ct. 448; BALLARD v. SEARLS, 130 U.S. 50, 9 Sup. Ct. 418; ROGERS v. THE ST. CHARLES, 19 How. (U.S.) 108, 15 L. Ed. 563; BINNEY v. CHESAPEAKE & O. CANAL CO., 8 Pet. (U.S.) 214, 8 L. Ed. 921, 3 Amer. Jur. 712.

This rule has a special application to a decision by an appellate court reversing an order sustaining a demurrer to a petition or a motion to dismiss on the ground that the petition fails to state a claim upon which relief can be granted. DUKE POWER COMPANY v. GREENWOOD COMPANY, 299 U.S. 259, 57 Sup. Ct. 202; MOLLAN v. TORRANCE, 9 Wheat. (U.S.)

537, 6 L. Ed. 154; STATE EX REL LA PRADE v. SMITH (Ariz.), 31 Pac. (2d) 102, 92 A.L.R. 173; MIDLAND SAVINGS & LOAN COMPANY v. TRADESMENS NATIONAL BANK (10 C.C.A.), 57 Fed. (2d) 686, certiorari denied, 287 U.S. 615; WILLIAM J. FRIDAY & COMPANY v. UNITED STATES (3 C.C.A.), 61 Fed. (2d) 370; U. S. v. REVERE COPPER & BRASS COMPANY (D.C. N.Y.), 28 Fed. Sup. 277; POLK COMPANY v. GLOVER, 305 U.S. 5, 59 Sup. Ct. 15.

An unusually clear statement of the duty which devolves upon an appellate court in cases of this character is stated in the opinion in the case of WILLIAM J. FRIDAY & COMPANY v. UNITED STATES, supra. There the court said:

> "As a matter of practice we are at a loss to see how the plaintiff would have been entitled to a judgment on the facts if the court had overruled the government's demurrer as we now hold it should have done. At common law, or at any other law with which we are familiar, the action of a court in overruling or sustaining a general demurrer to a petition or narr. is a finding, on averred facts admitted, that the plaintiff has or has not a good cause of action. If the demurrer be sustained, the judgment for the defendant is, in most jurisdictions, either final or respondeat ouster at the election of the plaintiff. If respondeat ouster, the plaintiff may, as under the Pennsylvania rule, amend and go to trial. If final, it is conclusive upon both parties, but an appeal lies, as in this case. *If on the plaintiff's appeal the judgment on demurrer be reversed, it leaves the case as before demurrer or as though the demurrer had been overruled, and leaves it open to trial (after traverse) on the unaffected pleading, the averments of which, of course, must be proved before verdict.* True, all facts well pleaded are admitted by the demurrer but this admission is only for purposes of demurrer. It is not conclusive of the case; therefore it does not authorize the trial court, on overruling the defendants' demurrer, to enter judgment for the plaintiff; *nor does it authorize this court in reversing a final*

*judgment sustaining the defendant's demurrer to enter (or direct) judgment for the plaintiff in the nature of a judgment non obstante.*" (Emphasis ours.)

This court has determined that the entry of a final judgment in such a situation is erroneous in the case of POLK COMPANY v. GLOVER, 305 U.S. 5, 59 Sup. Ct. 15, 83 L. Ed. 6. Plaintiffs filed suit to challenge the constitutionality of a Florida statute covering the canning and labeling and sale of citrus fruit juices. Defendants, including the Florida Citrus Commission which intervened, filed answers and also filed motions to dismiss the bill of complaint upon the ground it failed to state a cause of action. A three-judge court was empaneled. On the application for interlocutory injunction the parties filed affidavits setting forth their respective contentions. At the hearing the three-judge court also heard the motions to dismiss for failure to state a cause of action. The injunction was denied, the motion to dismiss the bill was granted, and final judgment was entered accordingly, 22 Fed. Supp. 575. On direct appeal the Supreme Court held that the lower court erred in sustaining the motion, and in a per curiam opinion said:

> "We are of the opinion that the District Court erred in dismissing the bill of complaint. Plaintiffs did not submit the case to be decided upon the merits upon the bill, answers and affidavits. Defendants' motion to dismiss, like the demurrer for which it is a substitute (Equity Rule 29) was addressed to the sufficiency of the allegations of the bill. For the purpose of that motion, the facts set forth in the bill stood admitted. For the purpose of that motion, the court was confined to the bill and was not at liberty to consider the affidavits or the other evidence produced upon the application for an interlocutory injunction. But the findings of the court indicate that that evidence, in part at least, underlay the final decree it entered.

"We think that the facts alleged in the bill were sufficient to entitle the plaintiffs to an opportunity to prove their case, if they could, and that the court should not have undertaken to dispose of the constitutional issues (as to which we intimate no opinion) in advance of that opportunity."

Rule 12 of the FEDERAL RULES OF CIVIL PROCEDURE expressly authorizes the filing of a motion to dismiss on the ground that the plaintiff's pleading fails to state a claim upon which relief can be granted. Subdivision (d) of the rule provides that such motion shall be heard and determined before trial. It is an elementary rule that a defendant may in good faith test the sufficiency of a plaintiff's petition to state a cause of action if he acts in good faith. The FEDERAL RULES OF CIVIL PROCEDURE are but confirmatory of this fundamental principle.

We contend that the action of the trial court in sustaining the motion to dismiss should have been affirmed and our argument hereinafter is directed to this proposition, but in the event this court should find that the motion to dismiss was not well taken, nevertheless defendants are entitled to have the cause remanded for trial and the plaintiffs required to establish the allegations of their petition under the applicable rules.

**2. The parties to the lease having expressly contracted upon the subject matter of development, implied covenants of development are not applicable.**

In this case the parties, for a valuable consideration paid by grantees at the time of the execution and delivery of the lease, have expressly contracted that the grantee was not under any obligation nor compelled either to commence or drill any well or wells, or conduct any character of operations during the term of the grant, save and except such as

may be reasonably necessary to protect said land from drainage from producing wells on adjoining lands. The petition does not allege that there is any well or wells on adjoining lands draining the premises. Defendants contend, therefore, that plaintiffs are bound by this express covenant in the lease and cannot invoke implied covenants.

Under the settled law of the State of Texas in such cases, it is held that the express stipulation upon the subject matter of development, as here, prevents the existence of any implied covenant.

Cowden v. Broderick & Calvert, 131 Tex. 434, 114 S.W. (2d) 1166, affirming El Paso Court of Civil Appeals, 108 S.W. (2d) 562;
Gulf Production Company v. Kishi, 129 Tex. 487, 103 S.W. (2d) 965;
Gulf Production Company v. Kishi (T.C.A.), 105 S.W. (2d) 733;
Ralph v. Magnolia Petroleum Company, et al. (writ of error refused by the Supreme Court of Texas), 95 S.W. (2d) 222;
Waggoner Estate v. Sigler Oil Co., 118 Tex. 509, 19 S.W. (2d) 27;
Freeport Sulphur Co. v. American Sulphur Royalty Co., 117 Tex. 439, 6 S.W. (2d) 1039;
Burt v. Dearsom, 227 S.W. 354;
O'Neil v. Sun Oil Co. (writ of error refused), 123 S.W. 172;
Stanolind Oil & Gas Co. v. Christian (writ of error refused), 83 S.W. (2d) 408;
Lucy v. Dedman (writ dismissed for want of jurisdiction), 21 S.W. (2d) 546;
Bennett v. Giles, 12 S.W. (2d) 843.

This rule is also of universal application. As said in 6 R. C. L., page 589:

> "As in physics, two solid bodies cannot occupy the same space at the same time, so in law and common

> sense there cannot be an express and an implied contract for the same thing existing at the same time. This is an axiomatic truth. It is only when parties do not expressly agree that the law interposes and raises a promise."

Where an oil and gas lease is *silent* on the matter of development, there exists an implied covenant on the part of the lessee after discovery of oil and gas to continue exploration of the premises with reasonable diligence. W. T. WAGGONER ESTATE v. SIGLER OIL COMPANY, supra. But where the parties have expressly contracted as to the extent of development required, implied covenants do not form any part of the agreement, id.

In the case of GULF PRODUCTION COMPANY v. KISHI, supra, the Supreme Court of Texas said:

> "It is our opinion that the parties expressed, in the third paragraph of the first lease and in the fourteenth paragraph of the second lease, their agreements and intentions as to the number of wells required to be drilled by the lessee in the development of the premises covered by the two leases and as to the time when the wells should be drilled; in other words, that these two paragraphs contain the agreements of the parties upon the subject of development and the subject of diligence of development. This being true, there is no necessity for the implication of a covenant for development with reasonable diligence. To imply such covenant would be to make an agreement for the parties upon a subject about which they have in their written contracts expressly agreed."

Basing its opinion in the KISHI case upon an analysis of its opinion in the prior case of FREEPORT SULPHUR COMPANY v. AMERICAN SULPHUR ROYALTY COMPANY, supra, the Supreme Court in the KISHI case then said:

> "So here, if it be conceded that the drilling of the

fifteen wells on the one tract and the six wells on the other tract did not constitute reasonable development of all of the leased land, still there was no implied obligation for further development, because by the terms of the leases the parties *expressly stipulated upon the subject of development.* They deemed it advisable to set out in the leases the number of wells required to be drilled in the development of the property after the discovery of oil instead of leaving that matter to implication and to ultimate decision by a court or jury. This having been done, the obligations with respect to development imposed by the leases are to be determined by the express stipulations of the leases. For other authorities supporting the conclusion expressed see: Stanolind Oil & Gas Co. v. Christian (Tex. Civ. App.), 83 S.W. (2d) 408, 410 (application for writ of error refused); Stoddard v. Emery, 128 Pa. 436, 18 A. 339; Becker v. Submarine Oil Company, 55 Cal. App. 698, 204 P. 245; Harris v. Ohio Oil Company, 57 Ohio St. 118, 48 N.E. 502, 505; Merrill's Covenants Implied in Oil and Gas Leases, Para. 43, p. 122; Mills and Willingham's Law of Oil and Gas, Para. 108, p. 154; Summers' Oil and Gas, Para. 129, p. 414; 12 Tex. Jur., Para. 7, p. 13; 7 R. C. L., Para. 10, 11, p. 1093." (Italics ours.)

In the case of COWDEN v. BRODERICK & CALVERT, supra, the Supreme Court of Texas in a similar case said:

"The implied obligation to develop with reasonable diligence would have arisen after the discovery of oil in paying quantities in the first well if the parties to the lease had not contracted with respect to the development of the leased premises. Freeport Sulphur Co. v. American Sulphur Royalty Co., 117 Tex. 439, 6 S.W. (2d) 1039, 60 A.L.R. 890; Gulf Production v. Kishi, 129 Tex. —, 103 S.W. (2d) 965. The lease is not silent on the *subject* of development. It requires the lessee in the event of production on adjoining land to drill proper and necessary offsets and then provides: 'Lessor agrees that all other de-

velopment shall be at the discretion of the lessee.' The judgment on discretion of the lessee exercised in good faith is not the same measure for the lessee's obligation in the matter of development as the reasonable development required by the implied covenant which arises in the absence of express stipulation as to development. Texas Pacific Coal & Oil Co. v. Barker, 117 Tex. 418, 432, 6 S.W. (2d) 1031, 60 A.L.R. 936." (Italics ours.)

Measured by the rule of decision announced by the Supreme Court of Texas, we submit that the attempt of the plaintiffs herein to invoke implied covenants of development, in the face of the express covenant in the lease on this subject, cannot be sustained.

**3. The Circuit Court of Appeals erred in holding that the word "term" as used in Paragraph Third of the grant refers only to the fixed or ten-year term and not to the whole term, including both the fixed period of ten years and the extension thereof by development.**

Paragraph Third of the lease provides that no development of any character is required by the lessee

> "during the term of this grant save and except such as may be reasonably necessary to protect said land from drainage," etc.

For the meaning of the words "term of this grant" we look to the habendum clause of the lease which states the term as

> "the period of ten (10) years from the date hereof, and for such other and further period of time as any of such minerals are produced from said land;"

In its opinion (Tr. 49-55) the Circuit Court of Appeals

holds that the construction of the word "term" as used in the third paragraph applies only to the fixed period of ten years and not to the development period, stating that any other meaning would be "absolutely self-contradictory" and the reasons therefor are stated to be that "it would have the lease say in Paragraph (3) that drilling was not required during either the term or its extension, and in the second paragraph that diligent drilling was essential to the extension of the term." We submit that the Circuit Court of Appeals has misconstrued the meaning and the relationship of these two clauses. The term of the oil and gas lease would expire at the end of ten years if there was no *production* (subject to the other conditions providing for the extension of the ten-year period to permit completion of development operations begun during the ten-year period). If the lease was producing at the end of the ten years, then, as far as the term clause is concerned, the lease would continue in force so long as production was secured, whether from one well or a number of wells. Paragraph Third deals with the development obligations. Its purpose is to limit the obligation of the lessee as to the extent of development, but it does not affect the term of the lease. A violation of the development obligation of a lessee would not necessarily terminate the lease. It might result in a judgment for damages for breach of a covenant, or perhaps, in extreme cases, a cancellation of undeveloped portions of the lease, but the *term* of the lease would remain unimpaired and would still be effective as to that portion of the lease upon which production was secured and on which the development obligation had been satisfied.

In Texas an oil and gas lease is held to vest in the lessee a determinable fee in the oil and gas in place. TEXAS COMPANY v. DAUGHERTY, 107 Tex. 240, 176 S.W. 717, L.R.A. 1917F 989; STEPHENS COUNTY v. MID-KANSAS OIL & GAS COM-

PANY, 113 Tex. 160, 254 S.W. 290, 29 A.L.R. 566; BROWN v. HUMBLE OIL & REFINING COMPANY, 126 Tex. 296, 83 S.W. (2d) 935, 99 A.L.R. 1107. A determinable fee is a fee simple estate subject to one or more limitations. In this case the limitations which would work a determination of the estate are (1) failure to obtain production or commence drilling before the expiration of the ten-year period; and (2) cessation of production after production had been obtained. The term of the grant is an entirety; it extends until the happening of one or more of the events stipulated to be a limitation on the estate of the grantee. Upon the happening of such an event, the grant *ipso facto* terminates.

Where an implied obligation of development exists, a breach of such obligation does not *ipso facto* terminate the lease. Affirmative steps must be taken by the lessor to secure relief against this obligation. If he is entitled to any remedy whatever, it is usually only after an adjudication by a court. Such an adjudication involves the presentation of evidence to the effect that the lessee has not developed the premises as an ordinarily prudent operator would do, and the issue will finally become a question of fact. There is no happening of an event which will *ipso facto* terminate the lease under the development obligation. It is this material difference between the term clause of the lease and the development clause which precludes one from modifying the other.

Furthermore, the development obligation does not even rise to the dignity of a condition subsequent. It is merely a covenant. A breach of the obligation will not work a forfeiture in the usual case, for the remedy for breach of implied covenant in Texas is an action for damages; and only in extreme cases, where the circumstances are extraordinary, where there can be no other adequate relief, will a court of equity entertain an action to cancel the lease in whole or in part. W. T. WAGGONER ESTATE v. SIGLER OIL COMPANY,

118 Tex. 509, 19 S.W. (2d) 27; T. P. COAL & OIL COMPANY v. BARKER (Tex. Sup.), 6 S.W. (2d) 1035; FREEPORT SULPHUR COMPANY v. AMERICAN SULPHUR ROYALTY COMPANY (Tex. Sup.), 6 S.W. (2d) 1045. Again, Paragraph Third of the lease stands by itself. There is not used therein one word which would indicate that its application should be confined to the ten-year period and not the full term of the lease. A splitting of the term and a limiting of the application to the first part of it would be an extraordinary construction of its meaning.

The Supreme Court of Texas in the KISHI case, supra, expressly refused to "split" the term of a lease to make way for the implied covenant. In that case the Supreme Court of Texas said:

> "Appellees' second proposition argues, in an effort to create a field for the operation of an implied covenant, that the express stipulations as to drilling wells do not state fully the duty of the lessee to develop but relate exclusively to development to be done within a specified period less than the entire term, and that there is an implied covenant for reasonable development during the remainder of the period for which the leases may endure. We find nothing in the leases suggesting that the express stipulations do not state fully the lessee's duty as to development. They specify the number of wells that must be drilled in the development of the property. The provisions that each well must be commenced within sixty or ninety days from the completion of the last prior well *were intended to accomplish the diligent drilling of the wells required and not to divide the terms of the leases into separate periods of development.* (Emphasis ours.)
>
> "Appellees' third proposition, that the stipulations for the drilling of the wells are conditions precedent to the acquisition by the lessee of new and enlarged estates as to which there are implied covenants for reasonable development, is untenable for the reason that it pre-

sents an erroneous conception of the nature of the estate created by the leases. It is settled in this state that an oil and gas lease, like those here under consideration, operates presently to invest the lessee with a determinable fee in the oil and gas in place. Texas Company v. Davis, 113 Tex. 321, 254 S.W. 304, 255 S.W. 601; Stephens County v. Mid-Kansas Oil & Gas Company, 113 Tex. 160, 254 S.W. 290, 29 A.L.R. 566; W. T. Waggoner Estate v. Sigler Oil Company, 118 Tex. 509, 19 S.W. (2d) 27; Sheffield v. Hogg, 124 Tex. 290, 77 S.W. (2d) 1021, 80 S.W. (2d) 741. The express provisions of the leases that the rights or estates of the lessee shall terminate on its failure to drill the wells are limitations upon the duration of the estates created by the leases. They are not conditions precedent to the acquisition of new or different estates. They are special limitations, by which, upon the happening of the contingency, the estate may come to an end before the regular end of the term. Tiffany's Real Property (2d ed.), Para. 59(b), p. 208; W. T. Waggoner Estate v. Sigler Oil Co., 118 Tex. 509, 519, 19 S.W. (2d) 27. No new estates arose or vested upon the completion of the wells stipulated to be drilled in the third paragraph of the first lease and in the fourteenth paragraph of the second lease. The drilling of the wells freed the estates created by the leases from the limitations prescribed in those paragraphs."

The ordinary meaning of the words "term of this grant" would be such period of time as the determinable fee would extend, that is, until the happening of one of the events named in the term clause which would terminate the grant. Paragraph Third does not have reference to any of these events. It simply provides for a modification of a covenant of the lease.

Another reason announced by the Circuit Court of Appeals for its decision is that the Sixth Paragraph of the lease expressly recognizes the existence of implied covenants and, therefore, the waiver of the development obligation in Para-

graph Third must be held to apply only during the ten-year term or the Sixth Paragraph will be nullified. The court fails to take into consideration that there is more than one kind of an implied covenant in a lease. Paragraph Third is directed only at the covenant requiring reasonable development, sometimes called "continuous" development and which, in effect, requires a lessee to continue development on the premises until a sufficient number of wells have been drilled to test the premises. In addition to the covenant of "reasonable development," there is also the covenant to protect against drainage on adjoining lands which "is a distinct obligation from the obligation imposed by the implied covenant to develop the property." STANOLIND OIL & GAS COMPANY v. CHRISTIAN (Tex. Civ. App.), 83 S.W. (2d) 408; UNITED NORTH AND SOUTH OIL COMPANY v. MEREDITH, 258 S.W. 550, 272 S.W. 124; POWELL v. DANCIGER OIL & REFINING COMPANY OF TEXAS (Tex. Civ. App.), 134 S.W. (2d) 493. There is also the covenant to use due care in operating and developing the property. HUMPHREYS OIL COMPANY v. TATUM (5 C.C.A.), 26 Fed. (2d) 882; MON-TEX CORPORATION v. POTEET, 118 Tex. 546, 19 S.W. (2d) 32. Thus, when it is taken into consideration that in addition to the obligation of reasonable development there are other covenants which may be implied in an oil and gas lease, Paragraphs Third and Sixth can both be given effect without conflict and without producing an illogical result.

Finally, the ordinary accepted meaning of the word "term" as used in legal authorities generally is at variance with the construction placed upon it by the Circuit Court of Appeals. In WEBSTER'S UNABRIDGED DICTIONARY the word "term" is shown to be synonymous with "duration" and "tenure."

BOUVIER'S LAW DICTIONARY, UNABRIDGED (Rawle's Third Revision), defines "term" as follows:

"The limitation of an estate: as a term for years, and

the like. The word *term* does not merely signify the time specified in the lease, but the estate, also, and interest that passes by the lease: and therefore the *term* may expire during the continuance of the time: as by surrender, forfeiture, and the like."

" 'Term' signifies not only the limitation of time, or period granted to the lessee for occupation of the premises, but it also includes the estate and interest in the land that pass during such period." (BARNES v. STANDARD OIL CO. OF CAL. (Wash.), 9 Pac. (2d) 1095, 1099).

Indeed the Supreme Court of Texas, in addition to its holding in the KISHI case, earlier fixed the question of what the "term" of a lease is in DAVIS v. VIDAL, 105 Tex. 244, 151 S.W. 290. The question was whether an instrument was an assignment of a lease, or was merely a subleasing. It became necessary, therefore, to determine precisely what the *term* of the lease was, for if the full term were transferred it was calld an assignment. Said JUDGE DIBRELL:

"It will be observed that, in stating the general rule as to what constitutes an assignment of a lease as distinguished from a sublease, the requirement is that the instrument must convey the whole *term*, leaving no interest or reversionary interest in the grantor.

"By the word 'term,' as used in the statement of this principle of law, is meant something more than the mere *time* for which the lease is given, and the instrument must convey not only the entire time for which the lease runs, but the entire estate or interest conveyed by the lease. Mr. Blackstone in his Commentaries (book 2, p. 144), in commenting on the significance of the word 'term,' when used in leases, says: 'Thus the word, *term*, does not merely signify the time specified in the lease, but the estate also and interest that passes by the lease; and therefore the *term* may expire, during the continuance of the *time*, as by surrender, forfeiture, and the like.' The meaning of the word 'term' as defined by Blackstone above, was adopted by the Supreme Court of

Massachusetts in the case of Dunlap v. Bullard, 131 Mass. 162, and by a number of text-writers on the subject of assignments and subleases." (Italics by the court.)

The principle is the same as to this grant or an oil, gas and mineral lease. The rule finds universal application in the United States. See:

Sanderson v. City of Scranton, 105 Pac. 469, 472;
Johnson v. Moxley (Ala.), 113 So. 651, 654;
Chicago Attachment Co. v. Davis Sewing Machine Co. (Ill.), 25 N.E. 669, 670;
Curry v. Bacharach Quality Shops, 117 Atl. 435, 438, 271 Pa. 364;
Hurd v. Whitsett, 4 Colo. 77, 84;
Gay Mfg. Co. v. Hobbs, 38 S.E. 26, 128 N.C. 46;
Austin v. Huntsville Coal & Mining Co., 72 Mo. 535, 37 Am. Rep. 446;
Delaware L. & W. R. Co. v. Sanderson, 1 Atl. 394, 109 Pa. 583;
Weander v. Claussen Brewing Ass'n, 42 Wash. 226, 84 Pac. 735, 736;
Taylor v. Terry, 71 Cal. 46, 11 Pac. 813;
Cochran v. Canty, 176 Iowa 713, 158 N.W. 559, 560;
Key v. Swanson, 113 Okla. 287, 241 Pac. 490, 492;
Rooney v. City of Omaha, 105 Neb. 447, 181 N.W. 143;
City Trust Co. of Newark v. Cohen (Court of Errors and Appeals, N. J., 1921), 112 Atl. 825, 95 N.J.L. 425;
Summers on Oil and Gas (Perm. Ed.), pages 103 to 173.

We submit that both under the authorities cited and the ordinary rules of construction the words "term of this grant" refer to the entire term and not to only the first portion thereof.

## Conclusion

WHEREFORE, petitioners respectfully submit that their petition for certiorari should be granted, and that upon con-

sideration of the case the decision of the Circuit Court of Appeals should be reversed and that of the District Court affirmed.

Respectfully submitted,

WALACE HAWKINS,
WM. A. VINSON,
*Attorneys for Petitioners*

*Of Counsel:*
EARL A. BROWN,
HUGH CARNEY,
THOMAS FLETCHER